82128-3

No. 35652-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Appellant,

v.

ROBERT O'NEEL, et al.,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

The Appellant, Allan Parmelee, a Washington State prisoner, was given an infraction and punished with a term of isolation and loss of privileges for sending a letter to Washington Department of Corrections (DOC) Secretary Harold Clarke in which he claimed to have heard that prison Superintendent Sandra Carter was "anti-male – a lesbian." The infraction and punishment were based on DOC's allegation that the statement in Mr. Parmelee's letter constituted criminal libel under RCW 9.58.010.

After exhausting the prison appeal process, Mr. Parmelee challenged the infraction by filing a *pro se* civil rights lawsuit in Clallam County Superior Court. He asserted multiple claims, including violations of his rights under the First Amendment. The parties filed cross motions for judgment on the pleadings, upon which the trial court dismissed Mr. Parmelee's entire complaint pursuant to CR 12(b)(6).

Mr. Parmelee asks this Court to reverse the dismissal of his complaint and order that his motion for judgment on the pleadings be granted. He argues (1) that Washington's criminal libel statute is

unconstitutional on its face, (2) that the DOC Defendants (collectively "DOC") applied the statute to him in an unconstitutional manner, (3) that he stated a valid claim for retaliation that should be allowed to proceed to trial, and (4) that DOC violated his substantive due process rights when it found him guilty of committing criminal libel without any evidence to support the elements of that charge.

ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in granting DOC's motion to dismiss under CR 12(b)(6).
2. The trial court erred in denying Mr. Parmelee's motion for judgment on the pleadings.

B. Issues Pertaining to Assignments of Error

1. Is Washington's criminal libel statute (RCW 9.58.010) unconstitutional on its face? (Assignments of Error 1 and 2)
2. Did DOC violate Mr. Parmelee's First Amendment rights by punishing him for making an allegedly defamatory

statement in a letter he sent to DOC Secretary Harold Clarke, refusing to consider whether or not the statement was true or whether, if the statement was false, Mr. Parmelee knew it was false when he made it? (Assignments of Error 1 and 2)

3. Did the trial court err in dismissing Mr. Parmelee's retaliation claim under CR 12(b)(6) when Mr. Parmelee had pled all of the elements necessary to support such a claim? (Assignment of Error 1)
4. Did DOC violate Mr. Parmelee's substantive due process rights by finding him guilty of an infraction without any evidence to support the required elements of that infraction? (Assignments of Error 1 and 2)

STATEMENT OF THE CASE

Appellant Allan Parmelee is a Washington prisoner who regularly speaks out and writes about prison conditions and prisoner rights. Clerk's Papers ("CP") 689 (Verified Complaint ¶ 24). He describes himself as outspoken and politically active. CP 687. He has written prisoner self-help books, news articles and press releases,

and has pursued litigation against state officials in order to help prisoners know and enforce their rights and to challenge official misconduct. CP 689-90. Mr. Parmelee's speech is often critical of DOC staff, policies, and operations. CP 687.

On July 20, 2005, Mr. Parmelee sent a letter to DOC Secretary Harold Clarke, complaining about programs and conditions at Clallam Bay Corrections Center (CBCC), including the treatment of prisoners there. CP 717-18. In the letter, Mr. Parmelee indicated that he had heard CBCC Superintendent Sandra Carter was "anti-male – a lesbian" and speculated that "[h]aving a man-hater lesbian as a superintendent is like throwing gas on [an] already smoldering fire." Id.

Approximately three months later, on October 14, 2005, DOC issued a serious infraction against Mr. Parmelee, claiming that his letter to Secretary Clarke "is considered to be liblous [sic] and slanders the character and reputation of Superintendent Sandra Carter." CP 714-15. According to DOC, Mr. Parmelee's letter violated Washington's criminal libel statute, RCW 9.58.010, and therefore was punishable under WAC 137-25-030(517)

("Committing any act that would constitute a misdemeanor and that is not otherwise included in these [prison disciplinary] rules"). CP 714-15. A DOC hearing officer found Mr. Parmelee guilty of the infraction and punished him by having him placed in isolation for 10 days and by denying him privileges for 10 days. CP 827.

Mr. Parmelee filed a lawsuit in Clallam County Superior Court in December, 2005, challenging his infraction on First Amendment and other grounds and seeking monetary, injunctive, and declaratory relief. CP 684-827. He later filed a motion for judgment on the pleadings. CP 105-16. The DOC Defendants opposed the motion and filed a cross-motion to dismiss the lawsuit. CP 91-103.

On October 3, 2006, a trial court commissioner issued a memorandum opinion, denying Mr. Parmelee's motion for judgment on the pleadings and granting the Defendants' motion to dismiss, concluding that Mr. Parmelee had failed to state a claim upon which relief could be granted. CP 86-87. Mr. Parmelee filed a motion to revise the commissioner's ruling (CP 48-55), which the trial court denied the same day. CP 47. Mr. Parmelee filed subsequent

motions for reconsideration and revision, which the trial court likewise denied. CP 19-32. Mr. Parmelee filed timely notices of appeal. CP 12, 17.

ARGUMENT

The Court should reverse the trial court's dismissal of Mr. Parmelee's complaint and the denial of his motion for judgment on the pleadings because Washington's criminal libel statute – the sole basis for the infraction which is the subject of this lawsuit – violates the minimum requirements set forth by the United States Supreme Court necessary to satisfy the First Amendment.

Even if the statute could be construed as constitutional under some circumstances, the trial court nonetheless erred in its rulings because DOC's application of the statute to Mr. Parmelee violated his First Amendment rights.

The lower court further erred by dismissing Mr. Parmelee's retaliation claim, as Mr. Parmelee adequately pled such a claim in his complaint and, contrary to the court's ruling, such claims are not precluded by the law's high threshold for prisoner due process claims.

Finally, Mr. Parmelee is entitled to judgment on the pleadings because his undisputed allegations demonstrate that DOC treated him arbitrarily and capriciously, denying him substantive due process, when it found him guilty of the criminal libel infraction with no evidence to support the required elements of that charge.

A. Standard of Review

A trial court's decision to dismiss a complaint under CR 12(b)(6) is an issue of law that the appellate court reviews *de novo*. San Juan County v. No New Gas Tax, 160 Wn.2d 141, 164, 157 P.3d 831 (2007) (citation omitted). A motion to dismiss under CR 12(b)(6) must be denied unless the plaintiff can prove no facts consistent with the complaint – including hypothetical facts – that would entitle the plaintiff to relief. Halvorson v. Dahl, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). The court accepts as true all allegations in the complaint and the reasonable inferences that may be drawn therefrom. Howell v. Alaska Airlines, Inc., 99 Wn. App. 646, 648, 994 P.2d 901 (2000). CR 12(b)(6) motions should be granted "sparingly and with care," and only in unusual cases. San Juan County, 160 Wn.2d at 164 (citations omitted).

A trial court's order on a CR 12(c) motion for judgment on the pleadings is also subject to *de novo* review. North Coast Enterprises, Inc. v. Factoria Partnership, 94 Wn. App. 855, 858, 974 P.2d 1257 (1999) (citations omitted).

Finally, the constitutionality of a statute is an issue of law, which the appellate court reviews *de novo*. State v. Watson, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007) (citations omitted).

B. RCW 9.58.010 is Unconstitutional on Its Face.

The infraction Mr. Parmelee challenges in this lawsuit was based solely upon DOC's allegation that he violated Washington's criminal libel statute, RCW 9.58.010. CP 714-15. That statute provides as follows:[1]

> Every malicious publication by writing, printing, picture, effigy, sign, radio broadcasting or which shall in any other manner transmit the human voice or reproduce the same from records or other appliances or means, which shall tend: –
>
> (1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

[1] The complete statute is attached to this brief as Exhibit 1.

(2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3) To injure any person, corporation or association of persons in his or their business or occupation, shall be libel.

Every person who publishes a libel shall be guilty of a gross misdemeanor.

RCW 9.58.010.

It is questionable whether this statute remains enforceable. See Clawson v. Longview Publ'g Co., 91 Wn.2d 408, 425 n.2, 589 P.2d 1223 (1979) (the criminal libel statute "expired when the 1976 criminal code (RCW Title 9A) became effective, and the present law does not punish libel") (Rosellini, J., dissenting). Indeed, there are no reported cases where the State has attempted to enforce this statute against a criminal defendant. However, even if the statute did not expire with the adoption of the 1976 criminal code, it nonetheless is unconstitutional and therefore unenforceable.

In 1964, the United States Supreme Court struck down as unconstitutional a criminal defamation statute very similar to Washington's. See Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct.

209, 13 L. Ed. 2d 125 (1964). The Louisiana statue at issue in Garrison defined defamation as follows:

> Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, or anything which tends:
>
> (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or
>
> (2) To expose the memory of one deceased to hatred, contempt, or ridicule; or
>
> (3) To injure any person, corporation, or association of persons in his or their business or occupation.
>
> Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

Id., 379 U.S. at 65 n.1. The Louisiana statute established a rebuttable presumption of malice for false statements. Id. The Washington statute is even more restrictive, establishing a presumption of malice – even for true statements – except when (1) the statement "charges the commission of a crime, is a true and fair statement, and was published with good motives or for justifiable ends," or (2) the statement was "honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and

consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation." RCW 9.58.020.

In reviewing the constitutionality of the Louisiana statute, the Supreme Court first considered the rule it had established in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). In that case, the Court held that "the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Garrison v. Louisiana, 379 U.S. at 67 (citing New York Times Co. v. Sullivan, 376 U.S. at 279-80). In Garrison, the Court held that "the New York Times rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials." Id., 379 U.S. at 67. Specifically, the Court held as follows:

> If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice.

> It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion – a legal right to make a publication – and the matter true, the end is justifiable, and that, in such case, must be sufficient.
>
> Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. . . .
>
> Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since erroneous statement is inevitable in free debate, and it must be protected if the freedoms of expression are to have the breathing space that they need to survive, *only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions*. For speech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Id., 379 U.S. at 73-75 (internal quotation marks and citations omitted; emphasis added).

The Court in Garrison concluded that Louisiana's criminal defamation statute was unconstitutional because (1) "contrary to the New York Times rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with 'actual malice,'" and (2) the statute failed to limit punishment for false statements to those situations where the statements were made with knowledge of their falsity or in reckless disregard of whether they are true or false. Id., 379 U.S. at 77-78.

In 2003, applying the rules set forth in Garrison, the United States Court of Appeals for the First Circuit struck down the criminal libel statute of Puerto Rico as unconstitutional because (1) the statute punished false statements without requiring proof that the speaker either knew of the statement's falsehood or acted with reckless disregard of falsehood, and (2) the statute did not provide a sufficiently broad affirmative defense for true statements. Mangual v. Rotger-Sabat, 317 F.3d 45, 66-67 (1st Cir. 2003).

Based on the rules set forth by the Supreme Court in Garrison, Washington's criminal libel statute is unconstitutional on its face because (1) it does not provide a complete defense for

truthful statements, and (2) it allows the state to punish false statements without requiring proof that the speaker knew of the statement's falsity or acted with reckless disregard of falsehood. Therefore, DOC's infraction against Mr. Parmelee, which was based solely on an alleged violation of the criminal libel statute, was invalid and the trial court erred in upholding it.

C. RCW 9.58.010 is Unconstitutional As Applied to Mr. Parmelee.

Even if RCW 9.58.010 could be construed as constitutional under certain circumstances, it still would be invalid insofar as it purports to allow the government to punish prisoners for statements made in outgoing grievances to prison officials.

1. Punishing Mr. Parmelee for the Content of his Letter to Secretary Clarke Violated Mr. Parmelee's Free Speech Rights.

The First Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, prohibits the government from abridging the freedom of speech. U.S. Const. amend. I. Prison regulations that restrict the content of prisoners' outgoing mail violate the First Amendment unless they (1) "further an important or substantial governmental interest unrelated

to the suppression of expression," and (2) impose restrictions that are "no greater than necessary or essential to the protection of the particular governmental interest involved." Procuier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1974).[2]

In Martinez, the Supreme Court struck down rules that allowed prison staff to censor outoing prisoner mail that "unduly complained," "magnified grievances," or contained "inflammatory political, racial, religious or other views" or matter deemed "*defamatory*" or "otherwise inappropriate." Id., 416 U.S. at 415 (emphasis added). The Court held that "the [California Department of Corrections'] regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands and were properly found invalid by the District Court." Id., 416 U.S. at 416. As the Court stated, "Prison officials may not censor inmate correspondence simply to eliminate unflattering or

[2] The Supreme Court later announced a more lenient standard for reviewing the constitutionality of prison regulations affecting free speech in other contexts. See Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). However, the Court subsequently affirmed the Martinez standard for cases where a court is reviewing prison regulations that concern outgoing correspondence. Thornburgh v. Abbott, 490 U.S. 401, 413, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989).

unwelcome opinions or factually inaccurate statements." Id., 416 U.S. at 413.

In this case, DOC used RCW 9.58.010 to punish Mr. Parmelee for an allegedly defamatory statement in his outgoing correspondence to Secretary Clarke. As the Supreme Court held in Martinez, such a restriction on outgoing mail is invalid under the First Amendment. Thus, the trial court erred in upholding DOC's actions, dismissing Mr. Parmelee's complaint, and denying his motion for judgment on the pleadings.[3]

2. Punishing Mr. Parmelee for the Content of his Letter to Secretary Clarke Violated Mr. Parmelee's Right to Petition the Government for Redress of His Grievances.

In addition to protecting free speech, the First Amendment also secures the right to petition the government for a redress of grievances. U.S. Const. amend. I. "The 'government' to which the First Amendment guarantees a right of redress of grievances

[3] The trial court refused even to consider Mr. Parmelee's First Amendment claims, ruling that Mr. Parmelee could assert no cognizable claims since the sanctions he received for his infraction did not implicate constitutionally protected due process rights. CP 23-24. This ruling was in error, as the threshold requirement for procedural due process claims (i.e., demonstration of an "atypical and significant hardship" in relation to the ordinary incidents of prison life) does not apply to claims under the First Amendment. See, e.g., Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2004).

includes the prison authorities, as it includees other administrative arms and units of government." Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) (citation omitted). Further, "[a] prisoner's right . . . to petition the government for a redress of his grievances under the First Amendment precludes prison authorities from penalizing a prisoner for exercising those rights." Id.

In Bradley, the Ninth Circuit held that the Oregon Department of Corrections' (ODOC) rule prohibiting prisoners from using disrespectful language, though facially valid, was unconstitutional when used to punish language in an inmate's grievance. The district court in that case concluded that "[p]risoners should be allowed to file grievances within the prison system without fear of being sanctioned for an unhappy choice of words, except to the extent that [the words include] criminal threats." Id. (alteration in original). The Ninth Circuit agreed and found that "[w]ithout question, the application of the ODOC disrespect regulations to [the prisoner's] written grievance impacts his constitutionally protected rights under the Fourteenth and First Amendments. Id. The court concluded by holding that "prison

officials may not punish an inmate merely for using 'hostile, sexual, abusive or threatening' language in a written grievance." Id. at 1282.[4]

Courts likewise have held that prison officials may not sanction a prisoner merely for making false or defamatory statements in a grievance. In Wolfel v. Bates, 707 F.2d 932 (6th Cir. 1983), the plaintiff received an infraction for statements he made in a grievance about prison staff. Prison officials accused him of violating their rule prohibiting inmates from making "unfounded complaints or charges against staff members of the institution with malicious intent." Id. at 933 (internal quotation marks omitted). The plaintiff was sanctioned with a verbal reprimand. Id. The Sixth Circuit held as follows:

> We do not question the established principle that prison administrators possess considerable discretion

[4] Division 1 of the Washington Court of Appeals declined to follow Bradley when it ruled in a personal restraint petition that jail officials could sanction an inmate for using insolent language in an internal jail grievance. In re Parmelee, 115 Wn. App. 273, 63 P.3d 800 (2003). However, in that case the court analyzed the jail's regulations under the more deferential Turner v. Safley standard, under which a prison regulation is valid if it is reasonably related to a legitimate penological objective. Id., 115 Wn. App. at 283. In contrast, DOC's actions in this case are subject to the more demanding Martinez standard, as they concern outgoing prisoner correspondence as opposed to internal communications. See footnote 2 above. The DOC Defendants made no attempt in the trial court proceedings to justify their actions under the Martinez test, and indeed, the trial court made no findings or conclusions with respect to that test. Therefore, the trial court lacked a legitimate basis for dismissing Mr. Parmelee's First Amendment claims.

> in the regulation of internal institutional affairs. In the present case, however, the record reveals that prison authorities punished Wolfel without first finding: (1) that the statements contained in his petition were false, or (2) that the statements were "maliciously" communicated. In the absence of such findings, Wolfel was, in effect, subjected to discipline merely because he complained. This was an impermissible abridgement of his right to seek redress of grievances. Nowhere do we find authority for the proposition that prison administrators have an overriding interest in the *indiscriminate* suppression of peacefully communicated inmate complaints.

Id. at 933-34 (citations omitted; emphasis in original).

A different court reached the same result in another case challenging prison rules that imposed sanctions for making false or defamatory statements in a written grievance. See Hancock v. Thalacker, 933 F. Supp. 1449 (N.D. Iowa 1996). In Hancock, one of the plaintiffs received a discplinary report for filing a grievance in which he accused a corrections officer of being a racist and a member of the K.K.K. or some other white racist organization. Id. at 1462. The disciplinary report accused him of violating a prison rule which prohibited inmates from knowingly portraying, depicting, or expressing "oral or verbal defamatory statements or accusations towards any person." Id. at 1462. As the issue in Hancock

concerned internal communications, as opposed to outgoing prisoner correspondence, the court analyzed the prison's actions under Turner and concluded that even under this more lenient standard "imposing disciplinary sanctions merely for false or defamatory statements would violate a prisoner's constitutional right of petition." Id. at 1489. The court also stated, "[C]ourts must not only tolerate, but must impose constitutional protection of the right to petition to an extent that necessarily encompasses some false claims in order to prevent an unconstitutional chill on complaints that matter." Id. at 1487.

When DOC punished Mr. Parmelee for making an offensive statement in his grievance, it did so without regard to whether or not the statement was true, and without regard to Mr. Parmelee's knowledge at the time he made the statement. CP 693 (Verified Complaint ¶ 33). Such an indiscriminate restriction on a prisoner's right to petition the government for redress of his grievances is not permitted under the First Amendment, particularly in light of the more demanding test for reviewing prison regulations that concern outgoing prisoner correspondence, as set forth by the Supreme Court

in Martinez. Thus, the trial court erred in dismissing Mr. Parmelee's First Amendment claims and denying his motion for judgment on the pleadings.

D. Mr. Parmelee Stated a Cognizable Claim for Retaliation.

In his complaint, Mr. Parmelee alleged that the Defendants acted with retaliatory intent to prevent him from making statements or complaints critical of DOC staff or policy. CP 698 (Verified Complaint ¶ 49). The trial court dismissed, without addressing, Mr. Parmelee's retaliation claim on the ground that he had failed to establish that he had been subjected to an "atypical and significant hardship" as a result of his infraction. See CP 23-24, 86-87. Although a prisoner must demonstrate an atypical and significant hardship in order to pursue a Fourteenth Amendment procedural due process claim (see Sandin v. Connor, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)), this requirement does not apply to retaliation claims under the First Amendment. See, e.g., Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2004), which noted the following:

> Even where conditions of confinement do not implicate a prisoner's due process rights, inmates retain other protection from arbitrary state action . . . within the expected conditions of confinement. They

> may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.
>
> Of fundamental import to prisoners are their First Amendment right[s] to file prison grievances and to pursue civil rights litigation in the courts. Without these bedrock constitutional guarantees, inmates would be left with no viable mechanism to remedy prison injustices. And because purely retaliatory actions taken against a prisoner for having exercised those rights necessarily undermine those protections, such actions violate the Constitution quite apart from any underlying misconduct they are designed to shield.

Rhodes, 408 F.3d at 567 (internal quotation marks and citations omitted). See also Pratt v. Rowland, 65 F.3d 802, 806 & n.4 (9th Cir. 1995) ("[T]he prohibition against retaliatory punishment is 'clearly established law' in the Ninth Circuit, for qualified immunity purposes. That retaliatory actions by prison officials are cognizable under § 1983 has also been widely accepted in other circuits.") (citing decision from the 2nd, 7th, 8th, 9th, 10th, and 11th Circuits).

"A prisoner suing prison officials under section 1983 must allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and

discipline." Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003) (internal quotation marks and citation omitted). Here, Mr. Parmelee alleged that DOC retaliated against him for pursuing litigation against DOC officials and making statements or complaints critical of DOC staff or policies. See CP 684-711 (Verified Complaint ¶¶ 30, 49). He also alleged that Defendants' actions did not advance any legitimate penological goals. Id. ¶¶ 36, 48. He alleged that DOC's actions did not even comport with its own mail policy, which provides that "[l]etters will not be censored to eliminate opinions critical of Department policy or Department employees." Id. ¶ 39; CP 745. He also alleged that the Defendants did not issue the infraction until almost three months after he sent the letter to Secretary Clarke, around the time he was actively pursuing litigation against prison officials. CP 692 (Verified Complaint ¶ 30). See Bruce v. Ylst, 351 F.3d at 1288 ("timing can properly be considered as circumstantial evidence of retaliatory intent") (quoting Pratt v. Rowland, 65 F.3d at 808).

Since Mr. Parmelee alleged all of the elements necessary to state a claim for retaliation, and since such claims do not require a

showing of an atypical and significant hardship, the trial court erred in dismissing the retaliation claim.

E. Defendants' Actions Toward Mr. Parmelee Were Arbitrary and Capricious.

In the context of prison disciplinary proceedings, prison officials violate a prisoner's due process rights when the officials' actions are "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding." In re Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984). Arbitrary and capricious action is defined as "willful and unreasoning action, without consideration and in disregard of facts and circumstances." Id. at 296 (citations omitted). A prison official acts arbitrarily and capriciously, and thus violates an inmate's substantive due process rights, if s/he finds the inmate guilty of an infraction without any evidence to support that finding. Id. at 295-97.

In this case, Defendants found Mr. Parmelee guilty of violating the Washington criminal libel statute without any evidence to support that finding. The statute defines criminal libel as a malicious publication that tends:

(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3) To injure any person, corporation or association of persons in his or their business or occupation.

RCW 9.58.010. According to the infraction reports and disciplinary hearing minutes and findings, the hearing officer did not find any evidence to suggest that Mr. Parmelee's letter, claiming to have heard that Superintendent Sandra Carter was "anti-male – a lesbian," caused Superintendent Carter to be exposed to hatred, contempt, ridicule or obloquy, that it deprived her of the benefit of public confidence or social intercourse, or that it injured her in her occupation. See CP 714-15, 807, 826-27. Indeed, it is difficult to even conceive that such a statement, being made as it was by a discontented prisoner to the head of the Department of Corrections – an agency that explicitly prohibits discrimination on the basis of sexual orientation – could possibly have any effect whatsoever on Ms. Carter's reputation or professional standing. Without any evidence to suggest that Mr. Parmelee's statement tended to cause

the type of harm required by RCW 9.58.010, the hearing examiner acted arbitrarily and capriciously in finding him guilty of violating that statute. Thus, the trial court erred in dismissing Mr. Parmelee's due process claim and in denying his motion for judgment on the pleadings.

F. Mr. Parmelee is Entitled to Attorney Fees on Appeal.

If Mr. Parmelee prevails in this appeal, he asks the Court to award him attorney fees for the appeal pursuant to 42 U.S.C. § 1988.

CONCLUSION

Mr. Parmelee's statement to Secretary Clarke regarding Superintendent Carter's supposed sexual orientation and its ostensible impact on conditions at CBCC was offensive. But the First Amendment does not protect only polite and enlightened speech. It also protects speech that is objectionable, speech that many would prefer not to hear.

Washington's criminal libel statue is unconstitutional under the First Amendment because it punishes people who make true statements, as well as people who make false statements without knowing they are false – defects that the U.S. Supreme Court has

deemed constitutionally fatal to criminal libel statutes. Since the statute is unconstitutional, DOC cannot use it as a basis for a prison infraction. Moreover, DOC's actions in punishing Mr. Parmelee for his statement were unconstitutional because they impermissibly infringed upon his First Amendment rights to send outgoing mail and to petition the government for redress of his grievances.

The trial court erred in dismissing Mr. Parmelee's complaint and denying his motion for judgment on the pleadings, not only because of the constitutional violations described above, but also because Mr. Parmelee stated valid claims for retaliation and substantive due process violations – claims that are not subject to the "atypical and significant hardship" requirement erroneously imposed by the court below.

Mr. Parmelee asks this Court to (1) declare RCW 9.58.010 unconstitutional, (2) reverse the trial court's dismissal of his complaint, (3) enter judgment for Mr. Parmelee on the issue of liability with respect to his First Amendment and substantive due process claims, and (4) remand this case to the trial court for further

proceedings on the retaliation claim and for determination of damages.

Respectfully submitted this 22nd day of August, 2007.

PUBLIC INTEREST LAW GROUP, PLLC

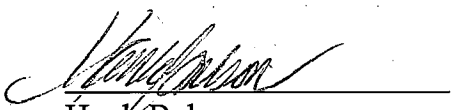

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EXHIBIT 1

Chapter 9.58 RCW
Libel and slander
Chapter Listing

RCW Sections

Notes:

Blacklisting: RCW 49.44.010.

Judge or justice using unfit language: RCW 42.20.110.

Sufficiency of indictment or information for libel: RCW 10.37.120.

9.58.010
Libel, what constitutes.

Every malicious publication by writing, printing, picture, effigy, sign[,] radio broadcasting or which shall in any other manner transmit the human voice or reproduce the same from records or other appliances or means, which shall tend: --

(1) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3) To injure any person, corporation or association of persons in his or their business or occupation, shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor.

[1935 c 117 § 1; 1909 c 249 § 172; 1891 c 69 § 3; Code 1881 §§ 1230, 1231; 1879 p 144 § 1; 1869 p 383 §§ 1, 2; RRS § 2424.]

9.58.020
How justified or excused — Malice, when presumed.

Every publication having the tendency or effect mentioned in RCW 9.58.010 shall be deemed malicious unless justified or excused. Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation.

[1909 c 249 § 173; Code 1881 § 1233; 1879 p 144 § 4; 1869 p 384 § 3; RRS § 2425.]

9.58.030
Publication defined.

Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof.

[1909 c 249 § 174; Code 1881 § 1234; 1869 p 384 § 5; RRS § 2426.]

9.58.040
Liability of editors and others.

Every editor or proprietor of a book, newspaper or serial, and every manager of a copartnership or corporation by which any book, newspaper or serial is issued, is chargeable with the publication of any matter contained in any such book, newspaper or serial, and every owner, operator, proprietor or person exercising control over any broadcasting station or reproducting [reproducing] record of human voice or who broadcasts over the radio or reproduces the human voice or aids or abets either directly or indirectly in such broadcast or reproduction shall be chargeable with the publication of any matter so disseminated: PROVIDED, That in any prosecution or action for libel it shall be an absolute defense if the defendant shows that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make such publication and was promptly retracted by the defendant with an equal degree of publicity upon written request of the complainant.

[1935 c 117 § 2; 1909 c 249 § 175; Code 1881 §§ 1230, 1231; 1879 p 144 § 1; 1869 p 383 §§ 1, 2; RRS § 2427.]

Notes:
Radio and television broadcasting: Chapter 19.64 RCW.

9.58.050
Report of proceedings privileged.

No prosecution for libel shall be maintained against a reporter, editor, proprietor, or publisher of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. The editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published.

[1909 c 249 § 176; RRS § 2428.]

9.58.060
Venue punishment restricted.

Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated, but a person shall not be proceeded against for the publication of the same libel against the same person in more than one county.

[1909 c 249 § 177; RRS § 2429.]

9.58.070
Privileged communications.

Every communication made to a person entitled to or concerned in such communication, by one also concerned in or entitled to make it, or who stood in such relation to the former as to offer a reasonable ground for supposing his motive to be innocent, shall be presumed not to be malicious, and shall be termed a privileged communication.

[1909 c 249 § 178; RRS § 2430.]

9.58.080
Furnishing libelous information.

Every person who shall wilfully state, deliver or transmit by any means whatever, to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial, any statement concerning any person or corporation, which, if published therein, would be a libel, shall be guilty of a misdemeanor.

[1909 c 249 § 179; RRS § 2431.]

9.58.090
Threatening to publish libel.

Every person who shall threaten another with the publication of a libel concerning the latter, or his spouse, parent, child, or other member of his family, and every person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort money or other valuable consideration from any person, shall be guilty of a gross misdemeanor.

[1909 c 249 § 180; RRS § 2432.]

Notes:
Extortion, blackmail, and coercion: Chapter 9A.56 RCW.

No. 35652-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ALLAN PARMELEE,

Appellant,

vs.

ROBERT O'NEEL, et al.,

Respondents.

CERTIFICATE OF SERVICE

I certify that on this date I caused to be mailed by first class mail, postage pre-paid, copies of (1) Brief of Appellant, (2) Stipulated Motion to Supplement Record on Appeal, (3) Decl. of Hank Balson in Support of Stipulated Motion to Supplement Record on Appeal, and (4) this Certificate of Service to:

Amanda Migchelbrink
Assistant Attorney General
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Dated this 22nd day of August, 2007

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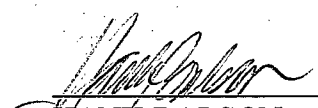

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